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No. 92-856

In the Supreme Court of the United States

October Term, 1992

JOSEPH J. PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTE at WALPOLE, ET AL.,
Petitioners,

v.

DENNIS J. DOMEGAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Circuit's decision below should be vacated, reversed or remanded in light of this Court's recent decision in Farrar v. Hobby, No. 91-990 (U.S. Dec. 14, 1992), when (i) the First Circuit applied the proper analysis in determining that Respondent was a "prevailing party" under 42 U.S.C. § 1988(b) because he had succeeded on a "significant" constitutional claim in this "bona fide civil rights action," and (ii) the First Circuit applied the proper analysis in determining, on facts that are different from Farrar, that there was no abuse of discretion in the District Court's awarding attorney's fees that had been greatly reduced to reflect Respondent's limited overall success?

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STATUTE INVOLVED

42 U.S.C. § 1988(b). Attorney's fees.

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This case was originally brought by Respondent Dennis J. Domegan ("Domegan"), a prisoner in the Massachusetts Correctional Institute at Walpole ("MCI-Walpole"), to obtain relief from violations of Eighth and Fourteenth Amendment rights arising out of a prison disciplinary program known as the Alternate Feeding Program ("AFP"). Appendix ("App.") 5a. Under the AFP, Domegan and other inmates were disciplined for certain actions

by being locked behind solid steel doors in their cells. At mealtimes, unless the inmate lay face down on his bed with his cell light on, he received no meal. If he complied with these conditions, he received a meal consisting of nothing but bread and cheese. App. 5a-6a; Domegan v. Fair, 859 F.2d 1059, 1062-63 (1st Cir. 1988). Prison officials determined unilaterally that an inmate should be put on the AFP; the AFP inmate was given no notice or opportunity for a hearing prior to the AFP placement. The inmate's status was reviewed only after five days by the prison official who put the inmate into the AFP program. Domegan was on the AFP for seven and one-half days in May 1983 and for five days in July 1983. App. 5a-6a.

Domegan sued Petitioners -- various administrators and correctional officials -- in 1983. His final amended complaint did not assert that Domegan had been wrongly placed on AFP, but instead alleged that the procedures used in the AFP deprived inmates of liberty without due process of law contrary to the Fourteenth Amendment, that the conditions of Domegan's confinement violated the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment, and that the Petitioners' actions constituted a violation of the Massachusetts Civil Rights Act, M.G.L. c. 12, § 11I. App. 6a-8a. Domegan sought declaratory, injunctive and monetary relief. As compensatory damages for his claims, he sought a total of

$50,000; he also sought punitive damages. App. 7a & 84a n.30. The First Circuit later recognized Domegan's case as a "bona fide civil rights action," notwithstanding the request for damages. App. 80a.

After extensive and difficult discovery (which required Domegan to bring successful motions to compel and which also included an award of sanctions against Petitioners), the District Court summarily ruled for Domegan on liability issues pertaining to the Fourteenth Amendment claim, finding that the AFP deprived inmates of liberty without due process. Petitioners' motion for reconsideration and an interlocutory appeal to the First Circuit -- delaying the trial for approximately one year -- were entirely unsuccessful. See

Domegan v. Fair, 859 F.2d 1059 (1st Cir. 1988).

In March 1989 the case proceeded to trial on the issue of damages for the due process violation, and on the merits of the remaining constitutional claims. By this time, more than five years after bringing this lawsuit, Domegan had been released from prison, and he accordingly "properly refrained" from pursuing further declaratory and injunctive relief. App. 8a & 81a n.28. The jury awarded Domegan damages in the amount of $1 on the due process claim, but held for the defendants on the remaining Eighth Amendment claims. Judgment was entered for $1 against Petitioners. App. 8a-9a.

In subsequent proceedings to determine Domegan's entitlement to a

fee award under 42 U.S.C. § 1988(b), Domegan requested fees and costs in the amount of $88,655.16 for services performed during the five-year time period spanned by the litigation. App. 9a & 96a. In the exercise of billing judgment and because of Domegan's limited success, Domegan's attorneys had reduced the request voluntarily to approximately "one-third of the hours counsel devoted to the litigation." App. 92a & 114a n.41.

Notwithstanding this voluntary reduction, the District Court cut Domegan's fee request by more than half, to $41,441.55, in light of Domegan's limited success. App. 9a-10a, 96a-98a, 131a-132a. See also App. 103a n.36 ("the court reduced the number of compensable

hours from 808.3 to 388.5" to reflect lack of success on other claims). Fees were limited to "only those hours explicitly spent on the due process issue, the summary judgment motion, and the appeal." App. 132a. As a practical matter "essentially no fee award was made for virtually all legal services devoted to pretrial discovery and to the trial itself." App. 112a. Put another way, Domegan had his total fees reduced approximately 80%.

The First Circuit affirmed the District Court's award, with technical modifications that further reduced the fees and costs awarded to $37,123.85. See App. 122a, 124a-125a. Petitioners filed a Petition for Writ of Certiorari.

On December 29, 1992, Petitioners also filed a Supplemental Brief in

this Court, asserting that the decision below should be vacated or reversed and remanded for reconsideration in light of the Court's decision in Farrar v. Hobby, No. 91-990 (U.S. Dec. 14, 1992). This brief responds to arguments raised in both the original Petition and in Petitioners' Supplemental Brief.

SUMMARY OF ARGUMENT

Contrary to Petitioners' assertions, the First Circuit's decision below, reported at 972 F.2d 401, need not be vacated, reversed or remanded because of this Court's decision in Farrar. The First Circuit adopted a legal analysis that is identical to the analysis set forth in Farrar and applied that legal analysis properly to the facts of this case.

As in Farrar, Domegan was found to be a "prevailing party" under 42 U.S.C. § 1988(b) because he prevailed on a "significant" constitutional claim and obtained an enforceable judgment of nominal damages against Petitioners. The First Circuit rightly approved the District Court's decision to award attorney's fees that had been reduced by approximately 80% to reflect Domegan's overall limited success.

In contrast to Farrar, where fees were denied, several factors made a fee award, albeit a very limited one, "reasonable" on the facts of this case. In particular, the First Circuit recognized that Domegan's claim was a "bona fide civil rights action" that was not solely about damages; his victory has precedential

impact and a deterrent effect on further wrongdoing; and the fee award had been properly reduced because of Domegan's limited success.

Under the circumstances, the District Court's exercise of discretion and the First Circuit's conclusion that there was no abuse of discretion are both correct. Nothing in Farrar requires reversal of the lower courts' fact-dependent decisions, and a remand is unnecessary in view of the careful, detailed analysis of the proper factors in the decisions below.

ARGUMENT

I. THE FIRST CIRCUIT CORRECTLY APPLIED THE SAME LEGAL ANALYSIS THAT WAS ADOPTED IN FARRAR.

In Farrar, this Court held that a plaintiff who is awarded nominal damages for violation of

constitutional rights is a "prevailing party" who qualifies for an award of "a reasonable attorney's fee" under 42 U.S.C. § 1988(b). In so holding, the Court adopted the same test for defining a "prevailing party" that was adopted by the First Circuit in the present case. Compare Farrar, slip op. at 8, with Domegan, App. 35a.

The First Circuit correctly held that Domegan was a "prevailing party" because he had "establishe[d] a significant procedural due process deprivation and obtain[ed] an enforceable nominal damage award against the responsible public officials." App. 90a. The First Circuit also held, rightly, that the degree of success -- i.e., the difference between the award requested and the success achieved -- goes to

the amount of the reasonable fee to be awarded, not to whether the plaintiff is a "prevailing party" under § 1988(b). App. 62a & 83a n.29. See Farrar, slip op. at 10; Texas State Teachers Assn. v. Garland Independent School Dist., 489 U.S. 782, 790 (1989) (same).[1/]

On the issue of what is a "reasonable" fee award, both this Court and the First Circuit held that, of the various factors that go into determining "reasonableness," the

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/1/ In this respect, both this Court and the First Circuit rejected the approach taken by the Fifth Circuit in Estate of Farrar v. Cain, 941 F.2d 1311 (5th Cir. 1991). Indeed, this Court's opinion in Farrar notes that the First Circuit's opinion below "rejected the Fifth Circuit's position and held that a nominal damages award does confer prevailing party status." Farrar, slip op. at 4 n.2.

critical factor is the "'degree of the plaintiff's overall success.'" Farrar, slip op. at 10 (quoting Hensley v. Eckerhart, 461 U.S. 424, 436 (1983)); Domegan, App. 103a n.36. And, like this Court, see Farrar, slip op. at 10, the First Circuit recognized that, in a case where a plaintiff has achieved only partial success, a fee award may be excessive if it is calculated by simply multiplying hours expended times a reasonable hourly rate. App. 105a n.37.

The First Circuit noted, however, that in the present case the fee award was not excessive or unreasonable because it had been sharply, and properly, discounted as a result of limited success:

> In response to the limited "degree of success" ... the

district court halved the fee request, even though the request sought compensation for only about one third the total time counsel devoted to the case.

App. 114a n.41 (emphasis added).[2]

See also App. 105a n.37. This

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[2] Petitioners waived their right to challenge this aspect of the fee reduction, for in the First Circuit they "d[id] not contend ... that the district court failed to reduce the fee request to reflect the recovery of only a nominal damage award on the procedural due process claim and the lack of success realized on the other claims." App. 103a n.36. Petitioners conceded below that Domegan's "degree of success" was already fully reflected in the District Court's fee award.

Petitioners now make the additional concession that "[t]hey did not argue [below] that even if Domegan was a prevailing party, the only reasonable fee in the circumstances of this case is no fee at all." Petitioners' Supplemental Brief at 6 n.4. Their failure to make such an argument below also constitutes a waiver of their present assertions.

reduction by the District Court was in addition to counsel's voluntary decision to request only approximately one-third of the total fees actually incurred. App. 114a n.41. As the First Circuit stated, "Careful review reassures us that the district court tailored its total award to reflect the value of the legal services in light of the time reasonably required for their performance and the degree of success achieved." App. 114a.

II. THE DECISION IN FARRAR DID NOT ELIMINATE THE LOWER COURTS' DISCRETION TO APPROVE FEE AWARDS, EVEN IN NOMINAL DAMAGE CASES.

Clearly, this Court in Farrar did not intend its decision to be a mandate that, in all cases where nominal damages are awarded, a fee request must be rejected outright. See Farrar, slip op. at 2 (White, J.,

concurring in part and dissenting in part).

The Court stated that, in cases where limited success is obtained, "the court may lawfully award low fees." Farrar, slip op. at 11. An award of no fees is only appropriate "[i]n some circumstances," and not all plaintiffs who are awarded nominal damages should be denied fees. Id. As Justice O'Connor put it, "Nominal relief does not necessarily a nominal victory make." Farrar, slip op. at 6 (O'Connor, J., concurring). Even if a nominal award in a case seeking compensatory damages "often" means that no fees are appropriate, Farrar, slip op. at 11, it also clearly means that fees are appropriate in other cases in which damages are nominal.

In addition, the Court's decision does not make the nominal nature of the damage award the sole determinant of whether the amount of fees awarded is "reasonable" for purposes of § 1988(b). Other factors, such as the legal issue on which the plaintiff prevailed, Texas Teachers, 489 U.S. at 792, and whether a public purpose is served, Farrar, slip op. at 7 (O'Connor, J., concurring), are also to be taken into account.

The Court's decision in Farrar thus confirms the long-established principle that it is appropriate for the District Court to exercise its discretion, on the facts of the case, to determine the reasonable fee award:

> We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate

> in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.

Hensley, 461 U.S. at 437. This Court has consistently admonished that the district court's balancing of the appropriate factors in determining the amount of the award should be given "appropriate deference." Webb v. County Board of Education, 471 U.S. 234, 244 (1985); Hensley, 461 U.S. at 437. As Justice White stated, "Civil rights cases often are complex, and we therefore have committed the task of calculating attorney's fees to the trial court's discretion for good reason." Farrar, slip op. at 2 (White, J., concurring in part and dissenting in part).

III. THE FACTS OF THE PRESENT CASE ARE DISTINGUISHABLE FROM FARRAR, AND JUSTIFY THE GREATLY REDUCED FEE AWARD THAT WAS GRANTED HERE.

Because Farrar does not establish a per se rule, the only issue presented by this case is the fact-bound question whether the District Court and the First Circuit abused their discretion in allowing the greatly reduced fee award on the facts of this case. For several reasons, the facts of the present case are distinguishable from those in Farrar, and fully justify the limited award of fees granted below.

First, the facts of Farrar are egregious. The plaintiff Farrar -- who died before the trial was held -- brought a suit in which the sole relief sought was $17 million in compensatory damages, based on an

allegation that he had incurred actual injury in that amount. But "because of his failure to prove [actual injury,] an essential element of his claim for monetary relief," his estate recovered nothing from the jury. Farrar, slip op. at 11. The jury only made the generalized finding that defendant had committed an act under color of state law that deprived the plaintiff of a civil right. See Farrar v. Cain, 756 F.2d 1148, 1152 (5th Cir. 1985). The nominal $1 in damages he ultimately received was granted by the Court of Appeals, not the jury. For this he recovered fees of approximately $280,000, more than seven times the fees awarded here. Id.

The issues upon which Farrar prevailed were also insignificant and

of no interest outside the confines of the case. Indeed, the Fifth Circuit explicitly stated in Farrar, "This was no struggle over constitutional principles. It was a damage suit and surely so since plaintiffs sought nothing more." Estate of Farrar v. Cain, 941 F.2d 1311, 1315 (5th Cir. 1991).

Moreover, as this Court expressly recognized, the District Court in Farrar made a fatal error by not taking the degree of success into account at all in determining the reasonableness of the fees. As this Court put it, "the District Court awarded $280,000 in attorney's fees without 'consider[ing] the relationship between the extent of success and the amount of the fee award.'" Farrar, slip op. at 12

(quoting Hensley, 461 U.S. at 438). The District Court failed to "engag[e] in any measured exercise of discretion." Id. at 10.

In the present case, by contrast, the First Circuit held that Domegan "obtained a final judgment for damages on a significant constitutional claim." App. 65a (emphasis added). See also App. 130a (District Court also noting that the claim was "significant"). Domegan proved that disciplinary detention in the AFP without any hearing or timely review of status was facially violative of the Fourteenth Amendment because it imposed punishment without prior notice and an opportunity to be heard. With respect to his success on this claim, the nominal damages award was found by the First Circuit to be

"relief commensurate with the intrinsically- nonpecuniary procedural due process deprivation established" by Domegan. App. 49a.

The First Circuit specifically distinguished the present case from others, like Farrar, in which the sole object of the suit is to recover money damages. App. 76a-82a. Unlike those cases, Domegan's case was a "bona fide civil rights action," which had its genesis in claims for injunctive and declaratory relief, and which "was not converted into a mere tort claim for damages simply because Domegan demanded compensatory relief." App. 80a-81a.

The First Circuit also recognized that Domegan's victory had "substantial" remedial significance and an "intrinsic deterrent effect"

against future constitutional violations by public officials. App. 66a-67a. See also Riverside v. Rivera, 477 U.S. 561, 574 (1986) ("Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards."). Petitioners, who continue to administer prison disciplinary programs, are prohibited from re-adopting the AFP, and will be prevented by the lower courts' findings from adopting programs with similar constitutional defects./3/

/3/ This deterrent and precedential impact of Domegan's successful due process claim is not eliminated by the fact that the AFP was changed by MCI-Walpole after Domegan filed

(Footnote continued.)

And, a case like this one, which has spawned two reported First Circuit decisions, will also serve as a precedent that should deter other prison officials from adopting other disciplinary programs which deprive inmates of liberty without due process.

Finally, in sharp contrast to the District Court in Farrar, the District Court below did "engag[e] in [a]

/3/ (Footnote continued.)

suit. There were two changes in the AFP: the first, in 1983, changed the menu given to AFP inmates; the second, in 1985, adopted post-deprivation review for inmates on the AFP. See App. 8a n.3. Domegan's suit established that Petitioners may not rescind these changes and that any AFP disciplinary program must have adequate due process safeguards. Petitioners -- and other prison officials for whom Domegan's case is an illuminating precedent -- must be aware of and honor the inmates' due process rights.

measured exercise of discretion" and decided to cut Domegan's fee request in half because of "limited success." App. 114 n.41. The District Court decided that counsel should be compensated for "only those hours explicitly spent on the due process issue, the summary judgment motion, and the appeal." App. at 132a. Essentially, no award was given for pretrial discovery and the trial itself. App. 112a. While "[t]here is no precise rule or formula" for tailoring fees to reflect limited success, Hensley, 461 U.S. at 436, this exercise of discretion by the District Court was clearly in compliance with this Court's teaching in Farrar and earlier cases. "The court necessarily has discretion in making th[e] equitable judgment" as to

the amount of a fee award, 461 U.S. at 437, and in this case the discretion was exercised properly.

CONCLUSION

Contrary to Petitioners' assertion, this is not a case in which "the only reasonable attorneys fee is no fee at all." Petitioners' Supplemental Brief at 6-7. Given the differences between the facts of Farrar and the facts of the present case, and given that the First Circuit applied the correct legal analysis when it affirmed the District Court's discretionary determination that a greatly reduced fee award was reasonable under 42 U.S.C. § 1988(b), nothing in Farrar requires this Court to reverse or remand for reconsideration. Indeed, such a step would needlessly extend the life of this

case and cause further expense and delay.

Respondent Domegan accordingly requests that this Court deny the petition for writ of certiorari and let the decision of the First Circuit stand.

Respectfully submitted,

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